

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUTH SCOTT,

Plaintiff-Appellant,

V

IOMED, INC.,

Defendant,

and

W.A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellee.

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UNPUBLISHED

August 10, 2001

No. 223913

Jackson Circuit Court

LC No. 98-088696-NO

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant W.A. Foote Memorial Hospital, Inc. (hereinafter defendant). We affirm.

Plaintiff had a history of temporomandibular joint syndrome (TMJ). Following a surgical procedure, plaintiff received physical therapy. The therapy involved range of motion treatment and iontophoresis. Iontophoresis is a process that utilizes an electric current to administer a drug across the skin. The device that administers the electric current consists of a battery power pack or alternating current (AC) power pack, current and voltage controls, an electrode connector, and two electrode wires, a dispersive electrode and a drug electrode. The drug electrode is applied to the skin treatment area, and the dispersive electrode is applied to a nearby body site. While a doctor prescribed the iontophoresis therapy, the application was performed by a physical therapist at defendant hospital.

On February 8, 1996, the iontophoresis was administered to plaintiff by physical therapist Dorinda S. Kroymann. Kroymann testified that the electrodes were placed on plaintiff and the machine was dialed to 2.5 milliamps. Plaintiff complained of muscle soreness. Consequently, the machine was dialed off, the electrodes were moved, and the unit was dialed back up to 2.5 milliamps. The medication lidocaine was administered for fifteen to twenty minutes without incident through the use of a positive charge. When the administration of the medication was complete, plaintiff would notify the physical therapist by pulling the call light. A second

medication, dexamethasone, was then administered by the same lidocaine medicated pad, but delivered through the use of a negative charge. The machine was dialed to 2.5 milliamps, and plaintiff did not report any problems from the setting.<sup>1</sup> After the dexamethasone was administered, Kroymann turned off the machine. When Kroymann turned off the machine, she heard plaintiff scream. Plaintiff reported receiving “the worse shock that she had ever received.” Kroymann removed the electrode and examined plaintiff’s skin. Kroymann observed the “normal pink color” that follows the iontophoresis treatment. Plaintiff initially went home, but returned to defendant hospital, where she was kept overnight for observation.

Plaintiff filed suit against Iomed, Inc., the manufacturer of the iontophoresis therapy unit and defendant hospital on June 2, 1998.<sup>2</sup> Plaintiff alleged two theories of liability against defendant hospital, negligence and medical malpractice. Plaintiff, however, failed to file an affidavit of merit with the complaint. On August 3, 1998, defendant moved for partial summary disposition of the medical malpractice claim based on plaintiff’s failure to file an affidavit of merit in accordance with MCL 600.2912d. On September 4, 1998, plaintiff filed a response to the motion, alleging that she was entitled to an additional ninety-one days after the filing of the complaint to submit the affidavit of merit due to defendant’s failure to provide treatment records. Plaintiff requested an additional twenty-eight days to file the affidavit of merit. On September 11, 1998, plaintiff filed an affidavit of merit from Dr. Richard Klein. The affidavit of merit, however, failed to set forth Dr. Klein’s qualifications or explain how the electrical shock received by plaintiff could have been avoided. On October 1, 1998, an order denying defendant’s motion for summary disposition was filed.<sup>3</sup>

On March 11, 1999, defendant filed a second motion for summary disposition. Defendant alleged that plaintiff improperly alleged a claim of negligence when her sole claim was for medical malpractice in the form of corporate negligence. Defendant also alleged that dismissal of the failure to maintain the iontophoresis unit allegation was warranted because plaintiff’s expert failed to find any defects in the device. Finally, defendant alleged that plaintiff’s expert was not qualified to provide standard of care testimony and dismissal was proper. In response to the motion, plaintiff alleged that questions of fact regarding the breaches by the physical therapist precluded summary disposition, a claim of negligence was feasible, and her expert concluded the unit was defective. On May 11, 1999, an order addressing the motion for summary disposition was filed. The trial court granted defendant’s motion to the extent that

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<sup>1</sup> We note that plaintiff’s notes of her treatment dispute Kroymann’s testimony. However, the dispute is not relevant to the ultimate disposition of the case.

<sup>2</sup> Iomed, Inc. is not a party to this appeal. Plaintiff stipulated to dismiss Iomed, Inc. from the litigation on October 22, 1999.

<sup>3</sup> The lower court docket entries indicate that oral arguments regarding defendant’s motion for summary disposition were held on September 11, 1998. However, plaintiff has failed to file the transcript of this hearing on appeal. Accordingly, the basis for the trial court’s denial of defendant’s motion is unknown. Additionally, we cannot determine whether the affidavit was filed with the court’s consent.

product liability and failure to maintain the unit claims were alleged against defendant. The motion was denied in all other respects.<sup>4</sup>

On August 23, 1999, defendant filed its third motion for summary disposition. Defendant alleged that plaintiff could not rely on the testimony of a dentist to establish the standard of care and breach by a physical therapist pursuant to *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). Defendant also argued that the statute of limitations had expired prior to the filing of the affidavit of merit, and the affidavit of merit also did not comply with the statutory requirements because Dr. Klein was a dentist without the necessary experience to render an opinion regarding physical therapists. In response, plaintiff argued that there was no basis for re-examining the prior negligence decision, her expert met the statutory requirements, and there was no dispute that Kroymann breached the standard of care. After hearing oral arguments on September 24, 1999, the trial court held that the affidavit of merit was not proper, Dr. Klein was not qualified to testify regarding the standard of care, and the action was a medical malpractice action and not an ordinary negligence case. On October 11, 1999, an order granting defendant's motion for summary disposition entered.

Plaintiff first argues that the trial court erred in granting summary disposition of the negligence claim. We disagree. Our review of a summary disposition decision is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A plaintiff cannot avoid the application of the procedural requirements accompanying a malpractice action by characterizing the action in terms of ordinary negligence. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999). To determine whether medical malpractice has been alleged, the key examination includes whether the alleged negligence occurred during the course of a professional relationship and whether the issues involved are within the common experience of the jury. *Id.* At 43-47. The issues in this case involve the propriety of the operation of the iontophoresis unit by Kroymann, the warnings provided by Kroymann to plaintiff, and defendant hospital's oversight of the iontophoresis treatment. These issues involve negligence in the course of a professional relationship as well as professional judgments that are beyond the common knowledge and experience of the jury. Accordingly, the trial court properly granted summary disposition of the negligence claim. See also *Danner v Holy Cross Hosp*, 189 Mich App 397, 398-399; 474 NW2d 124 (1991).

Plaintiff next argues that the trial court erred in concluding that Dr. Klein did not satisfy the conditions for expert witnesses set forth in MCL 600.2169. We disagree. The qualifications of an expert rest in the discretion of the trial court, and we will interfere with the trial court's ruling only to correct an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). When examining the qualifications of an expert witness in a medical malpractice action, the court must evaluate the education and training of the expert, the area of specialization, and the length of time engaged in the practice or instruction. MCL 600.2169(2). The trial court's discretion to allow expert testimony is limited by the practice or teaching requirements of MCL 600.2169. *McDougall v Schanz*, 461 Mich 15, 25; 597 NW2d 148 (1999). Review of the qualifications and deposition testimony of Dr. Klein reveals that he was not

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<sup>4</sup> The transcript from this hearing has not been provided. Accordingly, we have no indication of the basis for the trial court's decision.

qualified to testify regarding the standard of care for treatment during iontophoresis therapy. While Dr. Klein may have expertise in the treatment of TMJ, his only experience with the iontophoresis unit was a sales demonstration. Dr. Klein's continued assertion that he was qualified based on his ability to explain why the iontophoresis treatment was necessary has no bearing on his ability to assess the actions of Kroymann. Accordingly, the trial court did not abuse its discretion in determining that Dr. Klein was not qualified to render an expert opinion, *Mulholland, supra*. Consequently, without expert testimony to establish a breach of the standard of care, summary disposition of the medical malpractice claim was proper. Based on our disposition of this issue, we need not address the statute of limitations argument.

Affirmed.

/s/ Harold Hood  
/s/ William C. Whitbeck  
/s/ Patrick M. Meter